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No. 00-1045

IN THE

Supreme Court of the United States

TRW, INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Any suit to enforce the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA") must normally be brought "within two years from the date on which *liability arises*." 15 U.S.C. § 1681p [Section 618] (emphasis added). Section 618 also contains an express exception that mandates estoppel, whenever applicable, and thus may affect the running of the statute. *See id.* The "misrepresentation exception" applies only in the rare case where a reporting agency compounds its original FCRA liability by defrauding a consumer who makes an inquiry as of statutory right. *See id., see also* 15 U.S.C. § 1681g (setting forth consumers' statutory right to certain information). If the exception applies, the two-year limitations period begins entirely anew when the consumer discovers the falsity of the reporting agency's intervening fraud. 15 U.S.C. § 1681p.

Below, the Ninth Circuit Court of Appeals held that the general provision of Section 618 (*i.e.*, that a cause of action may be brought within two years of when it first *arises*), accommodates the "injury discovery rule." Accordingly, the Ninth Circuit ruled that the limitations period in this case did not begin to run until Plaintiff first discovered any injury that was caused by TRW. Petitioner maintains, however, that Section 618's general provision should be read as a statute of repose, pursuant to which the two-year limitations period would begin immediately whenever TRW breached a duty — regardless of any injury or its discovery. Thus, the legal question presented here is:

> Whether Section 618's general provision is a statute of repose; or whether it instead is a statute of limitations, which allows a plaintiff to bring suit within two years of the date on which her cause of action arises or within two years of the date on which it is discovered.

PARTIES TO THE PROCEEDINGS

The Petition sets forth Petitioner, TRW Inc., as the sole party to the proceedings. *See* Pet. at ii. Two additional parties warrant mention. The most important is Respondent Adelaide Andrews, who was the plaintiff and appellant below. Ms. Andrews is a resident of the State of California and a citizen of the United States of America.

In addition, Trans Union Corporation (later renamed and/or reestablished as Trans Union LLC, and hereinafter "Trans Union") was an original defendant below. *See* Pet., App. 10a. Trans Union settled following a partial summary judgment ruling providing that Respondent's claim for punitive damages against it could proceed to trial. *See* Pet., App. 54a. Thus, Trans Union was not a party to the appeal below and is not a party to these further proceedings.

Trans Union filed an *amicus curiae* brief in the Ninth Circuit Court of Appeals below, however, and has requested and received Respondent's consent to file an *amicus curiae* brief herein in support of the instant Petition, joined by other credit reporting agencies and their industry association.

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Respondent Adelaide Andrews respectfully asks this Court to deny the petition for writ of certiorari seeking review of one facet of the Ninth Circuit Court of Appeals' opinion below.

STATUTES INVOLVED

Most of the statutes that Petitioner ("TRW") reprinted and attached as an appendix to the Petition do not reflect the Fair Credit Reporting Act ("FCRA") as it was effective during the time frame relevant to this action. Instead, TRW provided statutes reflecting certain FCRA amendments that became effective on September 30, 1997 — almost a year after Respondent brought her suit below. *Compare* Pet., App. at 3a (indicating that Respondent filed her action below on Oct. 21, 1996), *with* the Consumer Credit Reporting Act of 1996, part of the Omnibus Consolidated Appropriations Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) (providing in Section 2404 thereof that Sept. 30, 1997 is the effective date of amendments).[1]

All of the FCRA provisions that TRW reprinted at Pet., App. at 67a-79a, reflect such anachronistic statutory language. Respondent therefore urges this Court to refer instead to the appendix that she provides herewith, which contains the relevant language of 15 U.S.C. §§ 1681b, 1681e, 1681g, 1681m, 1681n and 1681o as they were in effect during the relevant time frame. All references herein to these particular statutes refer to the statutes provided herewith.

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1. For example, TRW presents 15 U.S.C. § 1681b(a) as it was enacted in 1996, to become effective in 1997. *See* Pet., App. 67a-69a (15 U.S.C. § 1681b(a) as presented by TRW). *But see* Pub. L. No. 91-508, § 604, 84 Stat. 1136 (Oct. 26, 1970) (the corollary statute as it was originally enacted in 1970 and was in effect during the time frame relevant to this case).

CORRECTIONS AND ADDITIONS TO STATEMENT OF FACTS

Although Respondent disputes TRW's characterizations of many facts, Respondent addresses herein only TRW's most serious omissions and misstatements.

First, TRW presents to this Court many facts that are neither record facts nor recent developments permissible for citation pursuant to this Court's Rule 25(5). *See, e.g.*, Pet. at 15-16 (citations to various Internet web-sites visited), *see also Russell v. Southard*, 53 U.S. 139, 158-59 (1851) ("This court must affirm or reverse upon the case as it appears in the record."). Instead, TRW represents facts that were never marshaled below and are plainly belied by the facts of record below.[2]

Second, concerning TRW's characterization of facts of record, TRW reports that an impostor named *Andrea* Andrews misused Respondent *Adelaide* Andrews' social security number when applying for credit and various other benefits. Concerning such events and their fallout, Respondent provides the following corrections and additions:

1. TRW suggests that it never issued any credit reports concerning Respondent which resulted in credit being issued to the impostor. Pet. at 5. This suggestion is incorrect. TRW issued a credit report to Prime Cable of Las Vegas, which in turn issued a cable television account on credit to the impostor.[3] The Prime Cable

2. For example, TRW falsely suggests that reporting agencies would be severely over-burdened if asked to retain historical data for longer than two years. *See* Pet. at 16. The record evidence shows, to the contrary, that reporting agencies retain data beyond two years, and could retain all electronic data for many years at minimal cost.

3. TRW argues that, because Prime Cable of Las Vegas is a regulated utility required by law to provide cable television services to all consumers within its geographic area, it issued no credit to the (Cont'd)

credit account grew delinquent (due to non-payment in arrears), and — as is typical in cases of "identity theft" — the creditor sold the delinquent account to collection agents, who eventually dunned Respondent for payment of the impostor's bills. *See* Pet., App. at 3a.

2. During the decade of the 1990s, incidents of identity theft rose sharply throughout the nation. "Identity theft" occurs when an impostor utilizes some portion of a creditworthy consumer's identifying indicia to seek and obtain credit based upon the creditworthy consumer's credit record. The unwitting, innocent consumer whose good credit record is thus misused is typically saddled with the impostor's credit delinquencies, denied further credit, and harassed by credit collection agents.

3. Reporting agencies such as TRW,[4] Equifax and Trans Union have been at the heart of the "identity theft" problem. They have frequently released confidential records about creditworthy consumers without reasonable grounds for doing so, and thereby facilitated identity theft. Indeed, reporting agencies routinely — but unreasonably — disclose consumers' confidential credit records in response to subscribers' inquiries based only on minimally "matching" credit

(Cont'd)
impostor. *See* Pet., App. at 17a-18a n.4. This logic is flawed because Prime Cable of Las Vegas — as is typical of public utilities — would have exacted an up-front cash deposit from the impostor had TRW not improperly disclosed Respondent's good credit record. Hence, the impostor obtained the cable services on undeserved credit, with payment due in arrears.

4. Since late 1996, TRW's former credit reporting business has continued operating *sub nom* "Experian" following the divestiture by TRW of its credit reporting division to its credit reporting managers and new investors.

applications submitted by impostors. *See, e.g.*, Pet., App. at 17a (district court below reciting subscribers' inquiries reflecting the impostor's distinguishable identifying indicia, with the exception of Respondent's social security number, and a shared last name and first initial). The epidemic of identity theft has recently grown so prevalent that reporting agencies — acting as the hubs, repositories and supposed guardians of personal credit information — facilitate identity theft in hundreds of thousands of cases annually.

4. TRW is alleged to have willfully and negligently breached Respondent's statutory privacy rights on four separate occasions. *See id.* Two of the privacy breaches occurred within two years preceding the filing of this action. *See* Pet., App. at 11a, 17a. The other two privacy breaches occurred within three months of each other, just slightly longer than two years prior to the filing of this action. *See* Pet., App. at 23a. Importantly, all injury to Respondent from these four privacy breaches occurred and was discovered by Respondent within two years preceding the filing of her action. *See* Pet., App. at 18a.

5. TRW mischaracterizes aspects of the summary judgment proceedings below. For example, TRW suggests that its co-defendant, Trans Union, did not move for summary judgment. *See* Pet. at 7. In fact, Trans Union moved for summary judgment when TRW moved for partial summary judgment, but Trans Union achieved less success. *See* Pet., App. at 10a-11a. Trans Union thereafter settled with Respondent before trial, due partly to the fact that Respondent's claim for punitive damages against Trans Union (based upon alleged willful violations of FCRA) survived its summary judgment motion. *See* Pet., App. at 54a.

6. TRW also represents that it "moved for summary judgment, and the district court granted partial summary judgment. . . ." Pet. at 7. This is incorrect as well. TRW moved only for partial summary judgment. It never contested that the evidence indicated a genuine issue of material fact concerning TRW's alleged non-compliance with the FCRA's credit reporting "accuracy" requirements (set forth in 15 U.S.C. § 1681e(b)). *See* Pet., App. at 35a and 64a. TRW's partial summary judgment motion sought, *inter alia*, to set aside Respondent's claims concerning TRW's alleged violations of 15 U.S.C. §§ 1681b and 1681e(a) (*i.e.*, her "privacy" claim), as well as her claims for punitive damages for allegedly willful violation of FCRA. *See* Pet., App. at 3a, 21a-34a, 48a-51a, 55a-57a. The district court granted TRW's motion for partial summary judgment in its entirety. Pet., App. at 64a. Two-and-one-half years later, the Ninth Circuit reversed. *See* Pet., App. at 2a ("[W]e reverse the summary judgments awarded TRW. . . .").

7. TRW failed to note that the Ninth Circuit, when it restored Respondent's claim regarding TRW's alleged breaches of her privacy rights, also restored her claim for punitive damages with respect thereto. Specifically, based on its review of the record before it, the Ninth Circuit concluded as follows: "We reinstate the Plaintiff's [privacy] claim *together with her request for punitive damages based upon it*." Pet., App. at 8a (emphasis added). The Ninth Circuit thus recognized that the record evidence marshaled in response to the motion presented a genuine issue of material fact concerning whether TRW's privacy breaches were willful, warranting punitive damages. TRW does not challenge that ruling.

8. TRW correctly indicates that Respondent's "accuracy" claim (concerning which TRW did not move for summary judgment) progressed to trial after the partial summary judgments and resulted in a jury verdict favoring TRW. Pet. at 7. TRW ignores, however, the impacts that the erroneous partial summary judgments had on the prosecution of the thereafter-orphaned claim. Indeed, on appeal, the Ninth Circuit ruled that the trial court's "legal error" had further "infected" pre-trial rulings concerning the admissibility of certain critical trial testimony. *See* Pet., App. at 8a-9a. Unfortunately, the Ninth Circuit then deemed all such error "harmless" as it related to the trial of the "accuracy" claim, and declined to reverse the district court's judgment based thereon. *See* Pet., App. at 9a. *But see, e.g., Jordan v. Medley*, 711 F.2d 211, 219 (D.C. Cir. 1983) (Scalia, J., analyzing Fed. R. Civ. P. 61 and finding no necessary assurance that jury's judgment was not substantially swayed by error). Respondent respectfully views this aspect of the Ninth Circuit's ruling to be erroneous under Fed. R. Civ. P. 61, but acquiesces to it.

Concerning TRW's characterization of the Ninth Circuit's treatment of Section 618, Respondent adds the following:

9. Between 1985 and 1995, five circuit courts of appeals interpreted Section 618, resulting in two conflicting interpretations. Specifically, in chronological order, the Eleventh, Third, Seventh and Tenth Circuits ruled that the normal provision of Section 618 should be read as a statute of repose. *See Clay v. Equifax, Inc.*, 762 F.2d 952, 960-61 (11th Cir. 1985); *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322, 324-25 (3d Cir. 1986); *Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d 1175, 1181 (7th Cir. 1989) (following *Houghton*); *Clark v. State Farm Fire and Cas. Ins. Co.*, 54 F.3d

669, 670-72 (10th Cir. 1995) (following *Houghton* and *Rylewicz*).

10. TRW failed to apprise this Court that the Fifth Circuit, in *Hyde v. Hyberia Nat'l Bank*, 861 F.2d 446 (5th Cir. 1988), *cert. denied sub. nom. Credit Bureau Services - New Orleans v. Hyde*, 491 U.S. 910 (1989), broke from the short string of decisions that followed *Clay* and *Houghton* — and thus began a judicial trend of properly interpreting Section 618. Expressly rejecting *Houghton* (which interpreted Section 618 as a strict statute of repose), the Fifth Circuit held that the injury occurrence rule should be read into Section 618. *See id.* at 448-49. Specifically, it held that when a negligent violation of FCRA is alleged, the limitations period should commence running only when the injury to the consumer has occurred. *See id.* at 446, 448-49.

11. TRW suggests that issues concerning the FCRA statute of limitations are "frequently raised" in federal courts, citing twelve decisions in the last eight years. *See* Petition at 15 n.5 (citing primarily unpublished cases dating back to early 1993). Notably, outside of the Ninth Circuit (where the instant case has now established the law of that circuit), only two published federal cases in the last five years have addressed FCRA's statute of limitations. *Compare Ben-Hur v. Equifax Info. Serv., Inc.*, 976 F. Supp. 795, 801-02 (E.D. Wis. 1997) (following Seventh Circuit's analysis in *Rylewicz*), *with McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 812-14 (W.D. Ky. 1999) (expressly declining to follow *Houghton* and its progeny, including *Rylewicz*, after giving them "considerable respect and attention," but finding them "unpersuasive").

REASONS FOR DENYING THE WRIT

I. TRW IGNORES DISTINCTIONS BETWEEN STATUTES OF REPOSE AND STATUTES OF LIMITATIONS, AND AMONG THE INJURY OCCURRENCE RULE, THE INJURY DISCOVERY RULE, EQUITABLE TOLLING AND EQUITABLE ESTOPPEL, WHICH ARE KEY TO INTERPRETING SECTION 618.

Key to any proper resolution of the legal question presented by the instant Petition is an appreciation of various legal concepts involving statutes of limitations and statutes of repose. Respondent maintains that Section 618's general provision should be interpreted as a statute of *limitations*, such that the two-year limitation began when her cause of action was complete and she discovered it. TRW argues to the contrary that the Section 618's general provision should be interpreted strictly as a statute of *repose*, such that a two-year time frame in which to bring an action commenced immediately upon each of TRW's wrongful acts (*i.e.*, breach of any statutory duty) — irrespective of the occurrence or discovery of any injury. A "statute of limitations" governs the time within which an action may be brought after the cause of action arises (or accrues); whereas a "statute of repose" strictly limits the time within which an action may be brought following a potential defendant's transgression or wrongdoing. *See, e.g.*, *Hinkle by Hinkle v. Henderson*, 85 F.3d 298, 301 (7th Cir. 1996) (discussing the distinction between statutes of limitations and repose); *Bradway v. American Nat'l Red Cross*, 992 F.2d 298, 300-01 (11th Cir. 1993), (quoting *Wright v. Robinson*, 426 S.E.2d 870, 871-72 (Ga. 1993)).

Also central to a proper resolution of the legal question here is an appreciation of the distinctions among the injury discovery rule, the injury occurrence rule, equitable tolling and equitable estoppel. The "injury discovery rule" operates to forestall the commencement of a limitations period until such

time as the potential plaintiff discovers, or by reasonable diligence should have discovered, that he or she has been injured by some wrongdoing. *See Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990). The "injury occurrence rule," on the other hand, operates to forestall the commencement of a limitations period until an injury first occurs pursuant to some wrongdoing — irrespective of the plaintiff's discovery of the injury.[5] *See Rotella v. Wood*, 120 S. Ct. 1075, 1080 n.2 (February 23, 2000). Both of these "injury" rules address the question of when a limitations period first begins to run. *Id.* at 1079-80.

The two "injury" rules are themselves distinguishable from two tolling doctrines, "equitable tolling" and "equitable estoppel." Both operate to interrupt and extend a limitations period *after* it begins running. *See generally Cada*, 920 F.2d at 450 (distinguishing discovery rule, equitable tolling and equitable estoppel). The two tolling doctrines apply to different factual situations. "Equitable tolling" permits a belated suit

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5. Justice Scalia, joined by Justice Thomas, has championed the "injury occurrence rule" as an alternative to the injury discovery rule in certain circumstances. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 196 *et seq.* (1997) (Scalia, J., concurring opinion). That view, however, seems largely based upon the argument that the Racketeer Influenced and Corrupt Organizations Act (RICO) should be construed consistently with and in light of similar constructions of the Clayton Act. *See id.* at 197-99. Moreover, Justice Scalia's opinion in *Klehr* argues for commencement of the RICO statute of limitations "when a defendant commits an act that injures a plaintiff's business." *Id.* at 198. Here, Respondent first discovered TRW's FCRA violations on the same day — May 31, 1995 — on which her own business interests were first injured by TRW's actions. Pet., App. at 18a (Respondent was present when her prospective creditor first obtained a problematic credit report reflecting inaccuracies and earlier privacy breaches). Thus, in this case, there should be no difference between application of the injury discovery rule, on the one hand, and application of the injury occurrence rule championed by Justice Scalia, on the other hand. Respondent therefore reads Justice Scalia's concurring opinion in *Klehr* (and the differences between the injury occurrence rule and the injury discovery rule) as academic to the proper resolution of this particular action.

(after a statute of limitations has been exhausted) if the plaintiff was unable to obtain vital information bearing on the existence of his claim despite the exercise of all due diligence and despite *no* concealment or obstruction on the potential defendant's part. *See id.* at 451. "Equitable estoppel," on the other hand, "comes into play if the defendant takes active steps to prevent the plaintiff from timely filing suit, as by, for example, promising to the plaintiff not to plead the statute of limitations." *Id.* at 450-51.[6] As will be explained herein, Section 618 is a statute of limitations, not of repose, to which Congress affixed a special provision codifying the judicial principle of equitable estoppel.

II. FOR AT LEAST 170 YEARS, THIS COURT HAS CONSISTENTLY APPLIED THE DISCOVERY RULE TO ALL AMENABLE STATUTES OF LIMITATIONS.

The "injury discovery rule" or discovery rule is presumptively imputed in all statutes of limitations. *See Cada*, 920 F.2d at 450. TRW argues, however, that Congress twice — first in 1935 and again in 1986 — enacted statutes that expressly called for application of the discovery rule. *See* Pet. at 14 n.3 (citing 19 U.S.C. § 1621 and 42 U.S.C. § 9613(g)).[7] TRW thus

6. For example, assume that a consumer is wronged by a reporting agency (*e.g.*, his privacy is negligently breached). Assume further that the violation eventually leads to some injury, which the consumer discovers, and, in the course of investigating his claim, makes an inquiry to the potential defendant. *See* 15 U.S.C. § 1681g (consumers' statutory right to information from reporting agencies). Assume also that the consumer is then actively defrauded by the defendant, which wants to obfuscate its liability. The principle of equitable estoppel could then be fittingly applied to toll the statute of limitations during the time that the consumer is misled by the defendant's fraud. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396-97 (1946).

7. The Tariff Act of 1930 was amended in 1935 to express the discovery rule. *See* Act Aug. 5, 1935, c. 438, Title III, § 306, 49 Stat. 527 (amendments to Tariff Act of 1930). In 1986, 42 U.S.C. § 9613(g)

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suggests that the discovery rule cannot be inferred when interpreting Section 618. The refusal to apply the discovery rule to Section 618 runs contrary to more than 170 years of this Court's precedent.

Since at least 1830, this Court has consistently applied the discovery rule to statutes of limitations concerning fraud of any kind. Thus, in *Willison v. Watkins*, 28 U.S. (3 Pet.) 43 (1830), Justice Baldwin observed:

> [T]he statute of limitations receives the same construction and application at law and in equity. It is equally said that fraud as well as trust are not within the statute, and it is well settled that the statute [of limitations] does not run until the discovery of the fraud. . . . But after the discovery of the fact imputed as fraud, the statute runs as in other cases. . . . By setting up . . . a title adverse to his landlord, the tenant [here] commits a fraud as much as by the breach of any other trust. Why then should not the statute [of limitations] protect him, as much as any other fraudulent trustee, from the time the fraud is discovered. . .?

Id. at 52-53 (citations and quotations omitted). This same cardinal principle was restated by this Court in *Amy v. City of Watertown*, 130 U.S. 320 (1889):

> The courts of equity, . . . from an early day, have held that where one person has been injured by the fraud of another, and the facts constituting the fraud do not come to the knowledge of the person injured until some time afterwards, the statute [of

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was added to the Comprehensive Environmental, response, Compensation, and Liability Act (CERCLA). *See* Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, § 113(b), 100 Stat. 1767 (Oct. 17, 1986).

> limitations] will not commence to run until the discovery of those facts, or until by reason of diligence they might have been discovered.

Id. at 324.

Importantly, this Court understood at the time that "fraud" for such purposes was defined broadly: "Fraud, indeed, in the sense of the court of equity, properly includes all acts, omissions and concealments which may involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and by which an undue or unconscientious advantage is taken of another." *Moore v. Crawford*, 130 U.S. 122, 128 (1889) (quoting 1 Story, Eq. Jur. § 187).

In 1874, this Court specifically considered whether the discovery rule should apply to a "constructive fraud," such as the type of wrongdoing that TRW is alleged here to have perpetrated herein.[8] In *Bailey v. Glover*, 88 U.S. (21 Wall) 342

8. In this action, TRW is alleged to have perpetrated a constructive fraud against Respondent. "Constructive fraud consists in any act of commission or omission contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to the injury of another." BLACK'S LAW DICTIONARY 661 (6th ed. 1990); *accord id.* ("Actual fraud consists of deceit, artifice, trick, design and active operation of the mind; it includes cases of the intentional and successful employment of any cunning, deception, or artifice used to circumvent or cheat another. . . .").

By engaging in the business of consumer credit reporting, TRW voluntarily assumed a legal, fiduciary duty to safeguard reasonably all consumers' personal, confidential credit histories. *See* 15 U.S.C. § 1681(a)(4) ("There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy."); 15 U.S.C. § 1681(b) ("It is the purpose of [FCRA] to require that consumer reporting agencies meet the needs of commerce . . . in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the

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(1874), this Court considered whether the discovery rule should apply where a plaintiff's discovery of wrongdoing was delayed due to inherent latency, and not due to any active, intentional concealment or obstruction by the defendant. Justice Miller reviewed the precedents from England and the states of this nation, and thus concluded:

> [W]e hold that when there is no negligence or laches on the part of a plaintiff coming to knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, *or is of such character as to conceal itself*, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing, or those in privity with him.

Id. at 349-50 (emphasis added).

On the basis of cases such as these, federal courts have long recognized that, unless the statute at hand explicitly forbids it, any statute of limitations will not begin to run until a plaintiff discovers or should have discovered an injury flowing from a constructive fraud. *Rotella*, 120 S. Ct. at 1081 ("Federal courts, to be sure, generally apply a discovery rule when a statute is silent on the issue. . . ."). This Court has been unwilling to read the discovery rule out of any statute of limitations unless the legislative mandate to do so is clear and unambiguous, or unless its application would be "*fundamentally inconsistent* with" the

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requirements of [FCRA]."); §§ 15 U.S.C. § 168b(3)(A) and 1681e(a). Given this, TRW's four alleged privacy breaches concerning Respondent would constitute constructive fraud. *See Epstein v. United States*, 174 F.2d 754, 765-66 (6th Cir. 1949) (distinguishing between actual and constructive fraud). "Constructive fraud is a breach of legal or equitable duty which, in spite of the fact that there is no moral guilt resulting from the breach of duty, the law declares fraudulent because of its tendency to . . . violate public or private confidences, or to injure public interests." *Id.* at 766.

legislative provisions. *Lampf, Pleva, Lipkind, et al. v. Gilbertson*, 501 U.S. 350, 363 (1991) (emphasis added);[9] *accord Aldrich v. McCollough Properties, Inc.*, 627 F.2d 1036, 1042-43 (10th Cir. 1980) (a strict statute of repose "uses strong and unambiguous terms"); *Stuart v. American Cyanamid Co.*, 158 F.3d 622, 628 (2d Cir. 1998) (noting "unambiguous language" in the statutes of repose, quoting 2 CALVIN W. CORMAN, LIMITATIONS OF ACTION § 9.7.2, at 72 (1991) ("Statutes of repose, unlike statutes of limitations, are drafted in absolute terms with the apparent legislative intent to preclude all forms of postponement of the accrual date of the cause of action.")); *Ferguson v. Roberts*, 11 F.3d 696, 705 (7th Cir. 1993) ("The legislative history in 1934 makes it pellucid that Congress included statutes of repose. . . ."). Thus, all civil statutes of limitations should be read to incorporate the discovery rule — unless Congress clearly intended them as statutes of repose.

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9. Although this Court has ruled that *criminal* statutes of limitations are to be liberally construed in favor of repose, it has never so held concerning civil statutes. *See, e.g., United States v. Habig*, 390 U.S. 222, 227 (1968) (criminal limitations statutes are to be liberally construed in favor of repose). In dicta, the Eleventh Circuit has twice expressed the view that all statutes of limitations — criminal *and* civil — are to be liberally construed in favor of repose. *See United States v. Phillips*, 843 F.2d 438, 443 (11th Cir. 1988); *United States v. Gilbert*, 136 F.3d 1451, 1453 (11th Cir. 1998). The Eleventh Circuit's dicta are unfounded, however, and appear to be based upon a misinterpretation of dicta in *United States v. Marion*, 404 U.S. 307 (1971), wherein this Court noted that the "policies behind civil [and criminal] statutes of limitations are in many ways similar." *Id.* at 322 n.14; *see also Phillips*, 843 F.2d at 443. Concerning the interpretation of civil statutes of limitations, the California Supreme Court recently expressed the principle most consistent with this Court's precedent. *See Norgart v. Upjohn Co.*, 21 Cal. 4th 383, 396 (1999) ("[T]he affirmative defense based on the statute of limitations should not be characterized by courts as either "favored" or "disfavored." The two public policies . . . — the one for repose and the other for disposition on the merits — are equally strong, the one being no less important or substantial than the other.").

III. WHEN CONGRESS ENACTED FCRA IN 1970, IT DELIBERATELY REJECTED A STATUTE OF REPOSE IN FAVOR OF A STATUTE OF LIMITATIONS, TO WHICH IT ADDED THE ESTOPPEL PROVISION.

The plain language of Section 618, its overall statutory context, and the legislative history all indicate that it should be interpreted as a statute of limitations (not a statute of repose), to which Congress added an estoppel provision.

A. Considered in isolation, the plain language of Section 618 specifies a statute of limitations (not a statute of repose), to which is added a special exception that mandates application of estoppel when warranted.

Whenever interpreting any statute, one must begin with the language of the statute itself. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In attempting to present Section 618 as a strict statute of repose coupled with an equitable estoppel provision, TRW argues that "respondent filed her complaint more than two years after two of the alleged [TRW] violations, but did not allege any willful misrepresentation of information required to be disclosed to her [by TRW]." Pet. at 10. TRW thus asks this Court to rule that, absent a defendant's actual fraud concerning an inquiring consumer, FCRA's general limitations period would commence running when there is merely the breach of a statutory duty of care (*e.g.*, a privacy breach), *before* any tangible injury is caused thereby or discovered.

FCRA's statute of limitations, however, nowhere specifies that an action must be brought within two years following a violation of FCRA's substantive requirements. Instead, the plain language of Section 618 states that its normal, two-year limitations period should not commence running until the date on which *liability arises*. *Compare* Section 618 ("An action to enforce liability created under [FCRA] may be brought . . .

within two years of the date on which the liability arises. . . ."), *with* 15 U.S.C. § 1640(e) ("Any action . . . may be brought . . . within one year from the occurrence of the violation.").

The phrase "liability arises" should be interpreted in a straightforward and commonsense manner. *Cf. Hubbard v. United States*, 514 U.S. 695, 699-700 (1995) (preferring sensible statutory interpretation to attenuated construction). Plainly, "liability" — in the context of negligence — cannot exist unless all necessary elements are present: duty, breach, *causation* and *damages*. *See Rotella*, 120 S. Ct. at 1082 n.4 ("cardinal principle that a cause of action does not begin to run until the cause of action is complete"). Thus, "liability" as used in Section 618 requires a complete cause of action.

Similarly instructive is the meaning of the term "arises," which usually indicates the "springing up" or "presentation" of something already in existence. *See, e.g.*, 1 THE OXFORD ENGLISH DICTIONARY 629 (2d ed. 1989) (defining "arise" as "to spring up, . . . present itself"). Thus, the phrase in Section 618, "liability arises," means the presentation, springing up or manifestation of a complete cause of action.

In addition to its normal provision, Section 618 also includes a "misrepresentation exception," which provides:

> where a defendant has materially and willfully misrepresented any information required under [FCRA] to be disclosed to an individual and the information so misrepresented is material to the establishment of the defendant's liability to that individual . . . , the action may be brought at any time within two years after discovery by the individual of the misrepresentation.

15 U.S.C. § 1681p.

This "misrepresentation exception" is Congress' codification of the judicial concept of equitable estoppel.

It provides that, when a reporting agency materially deceives a consumer concerning the agency's extant liability to that consumer, the consumer has two years following the discovery of the deceit to bring a suit concerning the original liability, rather than two years from the time that the underlying liability arose.[10] Thus, the misrepresentation exception completely restarts the two-year statute of limitations in rare situations.[11]

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10. By codifying the "misrepresentation exception," Congress mandated application of estoppel where it might otherwise be denied due either to courts reserving their equitable powers or to the "jurisdictional" nature of FCRA's statute of limitations. A "jurisdictional" statute of limitations or repose sets forth both time limits and the jurisdiction of courts. *See Hardin v. City Title & Escrow Co.*, 797 F.2d 1037, 1040-41 (D.C. Cir. 1986) (holding that equitable estoppel cannot apply to a jurisdictional limitations provision); *Cada*, 920 F.2d at 451 ("Neither [equitable tolling nor equitable estoppel] applies to a jurisdictional statute of limitations."). The fact that Section 618 is "jurisdictional" in nature says nothing, however, about whether it should be interpreted as a statute of limitations rather than a statute of repose, because statutes of limitations and repose can be equally "jurisdictional" in nature. For example, the Privacy Act's statute of limitations — 5 U.S.C. § 552a(g)(5) — is a "jurisdictional" statute of limitations, whereby its limitations period commences only when the cause of action arises. *See* Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974) ("An action to enforce any liability created under this section may be brought in any district court . . . within two years from date on which cause of action arises. . . ."). On the other hand, the Truth in Lending Act contains a "jurisdictional" statute of repose, 15 U.S.C. § 1640(e), whereby its limitations period would run immediately upon the defendant's transgression of any substantive provision. *See* Pub. L. No. 90-321, Title I, § 130(e), 82 Stat. 146, 157 (1968) ("Any action . . . may be brought in any United States district court . . . within one year from the occurrence of the violation.").

11. Rather than merely providing tolling and revival, Congress provided that the two-year limitations period would start entirely afresh when a consumer discovers that a potential defendant had misrepresented any facts material to the establishment of liability against it. Presumably, in the ordinary case, the defendant's liability would

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Depending upon how much of the normal two-year limitations period is consumed *before* a defendant willfully misrepresents information material to its liability, the application of the misrepresentation exception could provide a plaintiff with almost four years — plus any additional time during which the consumer is deceived by a misrepresentation — between the time at which liability first arises and the time by which the complaint thereon must be filed.[12] This further indicates Congress' recognition of the need to provide consumers sufficient time to investigate and fashion claims about the unreasonableness of defendants' arcane credit reporting procedures.

B. The statutory context of Section 618 further indicates that it is a statute of limitations (not a statute of repose), to which is added the estoppel provision.

By axiom, a court should interpret a statute, if possible, as consonant with related provisions. *See In re Catapult Entertainment, Inc.*, 165 F.3d 747, 751 (9th Cir. 1999) (quoting

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have "arisen" before the reporting agency misrepresented material facts to the consumer who is investigating a potential claim. Thus, by enacting Section 618's misrepresentation exception, Congress provided that a defendant's intervening obfuscation would effectively *extend* the normal limitations period.

12. If, for example, a reporting agency breaches its FCRA duties on July 1, 2000, and the liability first arises on January 1, 2001, the consumer would normally have until January 1, 2003 to file his action. If, however, during the course of plaintiff's investigation of his FCRA claim, the defendant — on June 1, 2002 — misrepresents information material to its liability, the statute would be tolled at that point. Rather than being revived or re-commenced when the intervening deception is later discovered, the limitations period would instead begin anew at that point, providing two additional years to bring suit. Thus, if one assumes the deception is discovered on January 1, 2007 (ignoring any consideration of gross laches), the consumer would have until January 1, 2009 to file suit concerning the liability that initially arose on January 1, 2001.

2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992), "A statute should be construed so that effect is given to all its provisions, . . . and so that one section will not destroy another unless the provision is the result of obvious mistake or error."). The context of Section 618 indicates that it should be interpreted as a statute of limitations, not of repose, coupled with the "misrepresentation exception."

First, explaining when "liability arises," FCRA specifies that damages — and not the mere breach of a statutory duty — constitute the *sine qua non* of FCRA liability. *See* 15 U.S.C. § 1681o ("Any consumer reporting agency . . . which is negligent in failing to comply with any requirement imposed under [FCRA] with respect to any consumer is liable to that consumer in an amount equal to the sum of . . . any *actual damages sustained by the consumer as a result of the failure. . . .*") (emphasis added). In this case, Respondent was never injured by any of TRW's various privacy breaches — indeed, she had neither awareness of nor damage from them — until TRW's transgressions first affected her own commercial dealings, when her creditor reviewed the problematic credit history. *See* Pet., App. at 18a.

Second, 15 U.S.C. § 1681g provides the context and reason for Section 618's "misrepresentation exception." *See* 15 U.S.C. § 1681g. Specifically, since FCRA's enactment in 1970, 15 U.S.C. § 1681g has required credit reporting agencies to confess any wrongdoing to a consumer who requests information that is material to potential liability. *See id.* If one appreciates the fact that Congress intended reporting agencies to effectively "blow the whistle on themselves" through the begrudging disclosure of potentially harmful evidence, then the need for the misrepresentation exception becomes clear: the exception is a necessary complement to 15 U.S.C. § 1681g. It operates only in the rare case where a reporting agency compounds its original, constructive fraud (*e.g.*, a privacy breach) with actual fraud (*i.e.*, deliberate obfuscation through

"misrepresentation"). Absent deliberate obfuscation by a potential defendant, the two-year statute of limitation suffices. But where a defendant's actual fraud intervenes, estoppel is imperative.[13]

C. FCRA's legislative history reveals that Congress eschewed both a two-year and a five-year statute of repose in favor of the two-year statute of limitations coupled with the "misrepresentation exception."

TRW argues that FCRA's legislative history suggests that Section 618 should be interpreted as a statute of repose coupled with a misrepresentation exception. Pet. at 12-13. Specifically, TRW points to certain statements made by Congressional conferees about the inclusion of the misrepresentation exception and its effect on the statute. *See id.* at 13. Upon closer consideration, however, FCRA's legislative history undercuts TRW's argument.

FCRA was first introduced in the Senate in January 1969. *See* 115 CONG. REC. 2415-16 (Jan. 31, 1969). As introduced and throughout its almost two-year development in the Senate, the proposed legislation contained a strict, unambiguous, two-year statute of repose measured from the date of the potential defendant's breach of statutory duties of care. *See id., see also* 116 CONG. REC. 32641 (Sept. 18, 1970) (providing that "[a]ny action under [FCRA] may be brought . . . *within two years from the date of the occurrence of the violation*") (emphasis added).

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13. TRW argues that Section 618 cannot accommodate an implicit discovery rule due to the overall nature and structure of FCRA. *See* Pet. at 13. Specifically, TRW asserts that "[b]ecause most of the conduct regulated by the Act involves the conduct of credit reporting agencies and their customers independent of consumers, . . . consumers are not immediately aware of [FCRA] violations. . . ." *Id.* TRW's argument is betrayed by the fact that Congress took pains to require that consumers are promptly informed of the source and nature of any credit report that negatively affects a decision regarding the extension or review of credit. *See* 15 U.S.C. § 1681m.

During 1969 and 1970, the House of Representatives considered alternative bills concerning regulation of the credit reporting industry. *See, e.g.*, 115 CONG. REC. 33824 (Nov. 12, 1969) (introduction of H.R. 14765). Eventually, the favorite bill in the House became H.R. 16340, which was introduced by Rep. Sullivan on March 5, 1970. *See* 116 CONG. REC. 6200-01 (Mar. 5, 1970) (introduction); *id.* at 7796 (Mar. 17, 1970) (support for H.R. 16340 from author of earlier, competing bill). H.R. 16340 called for a relatively expansive five-year statute of repose. *See* 116 CONG. REC. 6200 (Section 27, Jurisdiction of Courts, Limitation of Actions, "Civil actions may be brought . . . within 5 years of the violations."). President Nixon's administration publicly supported the H.R. 16340 — including the five-year statute of repose. *See* 116 CONG. REC. 36576 (Oct. 18, 1970) (remarks of Rep. Sullivan regarding the Nixon administration's support for H.R. 16340).

After the Senate's bill was attached as an amendment to a non-germane House bill (regarding foreign bank secrecy), Congressional conferees met and redrafted FCRA in its final form. *See* 116 CONG. REC. 32638 (Sept. 18, 1970) (Senate amendment); *id.* at 34149 (Sept. 29, 1970) (appointment of House conferees, including the author of H.R. 16340); *id.* at 35843 (Oct. 8, 1970) (conference report including final FCRA language). When the final product emerged from conference, it contained neither the two-year statute of repose that the Senate had passed, nor the more expansive five-year statute of repose that the House of Representatives and the Nixon administration had favored. Instead, the final product reflected the extant statute of limitations and the misrepresentation exception: "A 2-year statute of limitations *from the date liability arises* is provided, except that where the defendant has willfully misrepresented information material to the establishment of . . . liability, the statute does not begin to run until discovery of such a misrepresentation." *See* 116 CONG. REC. 36573 (Oct. 13, 1970) (Rep. Sullivan's explanation of final enactment) (emphasis added).

The only logical explanation for the ultimate statutory language is that Congress intended for the normal provision of Section 618 to be a two-year statute of *limitations*, to which it added the misrepresentation exception. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting)).

IV. NOTWITHSTANDING PLAIN ERROR BY THE THIRD, SEVENTH, TENTH AND ELEVENTH CIRCUITS COURTS IN THEIR CONSIDERATION OF SECTION 618, THE JUDICIAL TREND FAVORS INTERPRETATION OF IT AS A STATUTE OF LIMITATIONS, NOT OF REPOSE.

Although TRW hints that the Ninth Circuit's decision below will create intolerable conflict throughout the federal courts, *see* Pet. at 8-11, the case law indicates otherwise. The judicial trend already favors recognition of Section 618 as a statute of limitations, not a statute of repose.

A. The Third, Seventh, Tenth and Eleventh Circuits erroneously concluded that interpreting Section 618's general rule as a statute of limitations is incompatible with the estoppel provision.

The first of the circuit courts to consider Section 618 was the Eleventh Circuit in *Clay v. Equifax, Inc.*, 762 F.2d 952 (11th Cir. 1985). Indicating only that the appellant there had asked alternatively for application of the "discovery rule" to negligent FCRA violations, the court merely announced, "[t]hat we will not do." *Id.* at 961. The court provided no explanation or analysis, except that it found no willful misrepresentation by the reporting agency. *See id.* at 960-61 (discussing inapplicability of misrepresentation exception). To the extent

that the Eleventh Circuit meant to suggest that the discovery rule and estoppel are somehow mutually exclusive or redundant concepts, the court erred. *See Cada*, 920 F.2d at 450-512 (distinguishing discovery rule from both equitable tolling and equitable estoppel).

The Third Circuit then addressed Section 618 in *Houghton v. Insurance Crime Prevention Inst.*, 795 F.2d 322 (3d Cir. 1986), wherein the court considered the apparent unfairness of not applying the discovery rule to Section 618, but then concluded that application of the discovery rule would render the misrepresentation exception "superfluous." *Id.* at 324-25. The Third Circuit erred in so ruling. The discovery rule and the misrepresentation exception (*i.e.*, estoppel) are wholly distinct and compatible. *See supra* at 18 n.12. A consumer's discovery of the falsity of the defendant's willful obfuscation could occur months or years after the consumer's initial injury (or the discovery thereof) based upon the agency's wrongdoing. Apparently, the *Houghton* court failed to distinguish a consumer's *original* discovery of his cause of action from his *subsequent* discovery of the falsity of a reporting agency's willful misrepresentation. These two "discovery" events are distinct: one is an initial discovery of a credit reporting problem or injury, and the other is a later discovery of the defendant's intervening, active obfuscation of its extant liability.[14]

In 1989, the Seventh Circuit followed the Third Circuit's erroneous decision *Houghton*. *See Rylewicz v. Beaton Serv., Ltd.*, 888 F.2d at 1181 ("We agree with the Third Circuit that an

14. This important distinction has been overlooked by courts and commentators. For example, the only published law review article concerning Section 618 erroneously concludes that the "trigger" for application of the discovery rule would necessarily be the exact same "trigger" for application of the willful misrepresentation exception. *See* Martha F. Davis, *Solving Statute of Limitations Problems Under the Fair Credit Reporting Act*, 18 IND. L. REV. 507, 511 n.31 (1985). On that faulty basis, the author concludes that the venerable discovery rule could not apply to FCRA. *Id.*

equitable tolling or discovery exception cannot be read into [FCRA]."). But the court in *Rylewicz* did not expressly adopt the *Houghton* court's "superfluity" reasoning. It merely restated the *Houghton* court's conclusion that the "misrepresentation exception" indicated Congress' intention to absolutely negate any inference of the discovery rule. *See id.* (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) for the proposition that courts cannot add to any litany of exceptions provided by Congress).

The final circuit court to consider Section 618 prior to the Ninth Circuit below was the Tenth Circuit in *Clark v. State Farm Fire and Casualty Ins. Co.*, 54 F.3d 669 (10th Cir. 1995). In *Clark*, the court relied on *Houghton* and *Rylewicz* in concluding: "[T]he evidence failed to show that the [misrepresentation] exception to the two-year limitations period provided by statute applies to plaintiffs' claim. . . ." *Id.* at 672 (quoting 15 U.S.C. § 1681p). In this manner, the Tenth Circuit followed the Third and Seventh Circuits into the same error. Finding the predicate for the misrepresentation exception lacking, the court failed to consider what should trigger commencement of the *normal* limitations period.

As they relate to FCRA's statute of limitations, *Clay*, *Houghton*, *Rylewicz* and *Clark* are all erroneously reasoned.[15] *See McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810, 812-14 (W.D. Ky. 1999) (declining to follow *Houghton* and *Rylewicz*). In concluding that Section 618's misrepresentation exception precludes the discovery rule, these learned circuit courts misapprehended the normal rule from which the exception varies. The misrepresentation exception

15. TRW informs this Court that the district court below had followed an unpublished 1995 decision of the Ninth Circuit which had uncritically followed the reasoning of the Third Circuit's *Houghton* decision, and thereupon refused to apply the discovery rule to Section 618. *See* Pet. at 7 (citing *Allen v. Equifax Credit Info. Services, Inc.*, 46 F.3d 1138, 1995 WL 21422 (9th Cir. Jan. 11, 1995) (mem. op.)). (Cont'd)

diverges from the normal rule that the two-year limitations period commences when the *liability arises*. *See supra* at 15-18. Therefore, the misrepresentation exception diverges from a statute of limitations, not of repose. To be sure, any statute of limitations includes the discovery rule unless Congress expresses a contrary intent. *See Rotella*, 120 S. Ct. at 1081 ("Federal courts, to be sure, generally apply a discovery rule when a statute [of limitations] is silent on the issue. . . ."); *Lampf*, 501 U.S. at 363; *Cada*, 920 F.2d at 450.

B. Several circuit courts of appeals have interpreted a statute that is virtually identical to Section 618 as a statute of limitations, coupled with the estoppel exception.

Circuit courts of appeals — including the two circuit courts of appeals that uncritically followed *Houghton* into plain error — have, when interpreting statutory language virtually identical to Section 618, found such language to constitute a statute of limitations, not a statute of repose. For example, in *Tijerina v. Walters*, 821 F.2d 789 (D.C. Cir. 1987), the District of Columbia Circuit Court of Appeals interpreted the Privacy Act's two-year statute of limitations concerning personal privacy breaches by the federal government, 5 U.S.C. § 552a(g)(5). That statute of limitations is virtually identical to Section 618 (which was enacted four years before the Privacy Act). *Compare* Section 618, *with* Pub. L. No. 93-579, § 2, 88 Stat. 1896 (1974) (the Privacy Act's statute of limitations).[16]

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Allen was an unsuccessful case brought by a *pro se* plaintiff, in which the Ninth Circuit (in an unpublished, per curiam decision) uncritically followed *Houghton* and *Rylewicz*. *Allen* thus has no precedential value, and, respectfully, should be afforded no consideration by this Court.

16. Even though the Privacy Act's statute of limitations, 5 U.S.C. § 552a(g)(5), is essentially identical to Section 618, the Seventh and Tenth Circuits — which followed *Houghton* in refusing to apply the (Cont'd)

Recognizing that the Privacy Act accommodated the discovery rule, the District of Columbia Circuit held that its two-year limitations period would not commence running "until the plaintiff knows or should know of the alleged violation." *Tijerina*, 821 F.2d at 797-98. Specifically, the court invoked this Court's opinion in *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 427 (1965) for the proposition that Congressional intent must guide the interpretation of a statute of limitations. *See Tijerina*, 821 F.2d at 797. The District of Columbia Circuit then explained the compatibility of the discovery rule with the misrepresentation exception:

> Contrary to the [defendant's] suggestion, our holding does not read out of existence the . . . [misrepresentation exception]. That clause extends the normal limitations period in order to ensure that the [defendant] cannot escape liability by purposefully misrepresenting information that could establish that it already has violated the Act. In such cases, the Act allows the period to commence upon actual discovery of the misrepresentation, whereas our holding today is that for other actions under the act, the period begins when the plaintiff knew or should have known of the violation. Our holding thus in no way affects the special treatment Congress provided for the particularly egregious cases of [defendant] misconduct singled out in the Act's statute of limitations.

Id. at 798 (citation omitted).

(Cont'd)
discovery rule to Section 618 (in *Rylewicz* and *Clark*, respectively) — have themselves applied the discovery rule to the Privacy Act limitations provision. *See Bowyer v. U.S. Dept. of Air Force*, 875 F.2d 632, 635-36 (7th Cir. 1989); *Bergman v. United States*, 751 F.2d 314, 316 (10th Cir. 1984).

One year later, the Ninth Circuit adopted this reasoning from *Tijerina* in *Englerius v. Veterans Admin.*, 837 F.2d 895, 897-98 (9th Cir. 1988) ("We join the Seventh, Tenth and District of Columbia Circuits in holding that a cause of action under the Privacy Act does not arise and the statute of limitations does not begin to run until the plaintiff knows or has reason to know of the alleged violation."). Importantly, *Englerius* (and thus *Tijerina*) formed the basis of the Ninth Circuit's decision at issue here. *See* Pet., App. at 6a.

C. The Fifth and Ninth Circuits each properly interpreted Section 618 as a statute of limitations, coupled with an estoppel exception.

TRW informs this Court of the fact that the Ninth Circuit Court of Appeals below has split from the Third, Seventh, Tenth and Eleventh Circuits by refusing to interpret Section 618 as a statute of repose. Pet. at 8-11. TRW omits mention, however, of the fact that, long ago, the Fifth Circuit Court of Appeals reached a similarly correct conclusion when it decided *Hyde v. Hyberia Nat'l Bank*, 861 F.2d 446 (1988), *cert. denied sub nom Credit Bureau Services – New Orleans v. Hyde*, 491 U.S. 910 (1989). In rejecting the defendant's argument that the "normal" provision of Section 618 should be interpreted as a statute of repose, the Fifth Circuit Court of Appeals reasoned:

> To commence the [limitations] period with the agency's negligent procedures would start the statute [of limitations] before the consumer can even become aware of the very existence of a cause of action. Such an interpretation would obviously frustrate the purpose of the Act. . . . The statute . . . establishes a cause of action to redress specific injuries sustained by the consumer. . . . *[T]he statute [of limitations] should be triggered when the agency issues an erroneous report to an institution with which the consumer is dealing*. . . . Because the tort

> is inchoate until the victim is injured, the date upon which the erroneous information is transmitted by the credit agency to the potential user [with which the consumer is dealing] corresponds to the date on which the limitations period for the tort begins.

Hyde, 861 F.2d at 449 (emphasis added).

Thus, in 1988, the Fifth Circuit firmly rejected the argument that Section 618 should be interpreted as a statute of repose to which Congress affixed the misrepresentation exception, as TRW argues.

The only practical difference between the Fifth Circuit's opinion in *Hyde* and the Ninth Circuit's opinion below is that the Fifth Circuit would commence the two-year limitations period on the date on which some problematic credit information is transmitted by a defendant to "an institution with which the consumer [*i.e.*, plaintiff] is dealing," *id.*, whereas the Ninth Circuit would commence the limitations period when the consumer discovers her injury. Therefore, the Fifth Circuit's interpretation suggests the "injury occurrence rule," whereas the Ninth Circuit has adopted the "injury discovery rule." In the overwhelming majority of FCRA cases, however, the consumer's knowledge (*i.e.*, discovery) would most likely come within a few hours or days of the transmission of problematic information to an institution with which the consumer is dealing. *See* 15 U.S.C. § 1681m (requiring a potential credit grantor to inform the consumer when a negative credit report affects a credit decision). Thus, as a practical matter, the difference between the Fifth Circuit's and Ninth Circuit's respective interpretations is slight, and the reasoning of either is clearly superior to the demonstrably erroneous *Houghton* line of reasoning.[17]

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17. In the instant case, Respondent was present when problematic credit reporting information was first transmitted to Home Savings and Loan on May 31, 1995, so the "injury occurrence" and "injury discovery" were concomitant — the two-year limitations period began running that day under either "injury" rule. Pet., App. at 18a. Accordingly, Respondent's ongoing case would not be affected were this Court to choose one way or the other between the two interpretations adopted by the Fifth and Ninth Circuits.

(Cont'd)

D. Even before the Ninth Circuit ruled as it did below, the judicial trend toward recognition of Section 618 as a statute of limitations was developing as it should.

The most recently published district court opinion, *McAnly v. Middleton & Reutlinger, P.S.C.*, 77 F. Supp. 2d 810 (W.D. Ky. 1999), was decided prior to the Ninth Circuit's decision below by a district court located within the Sixth Circuit (which has yet to publish a decision concerning Section 618). The district court in *McAnly* foreshadowed the Ninth Circuit's later reasoning and expressly rejected the erroneous reasoning set forth in Third Circuit's *Houghton* and its progeny. *See McAnly*, 77 F. Supp. 2d at 812-14. Accordingly, if this Court opts to leave the interpretation of Section 618 to the lower courts, it can do so with the knowledge that the *Houghton* line of reasoning is already crumbling under its own infirmity. Denying certiorari here would advance that process.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — RELEVANT STATUTES

15 U.S.C. § 1681b

§ 1681b. Permissible purposes of reports

A consumer reporting agency may furnish a consumer report under the following circumstances and no other:

(1) In response to the order of a court having jurisdiction to issue such an order, or a subpoena issued in connection with proceedings before a federal grand jury.

(2) In accordance with the written instructions of the consumer to whom it relates.

(3) To a person which it has reason to believe —

(A) intends to use the information in connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

(B) intends to use the information for employment purposes; or

(C) intends to use the information in connection with the underwriting of insurance involving the consumer; or

(D) intends to use the information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

(E) otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

(4) In response to a request by the head of a State or local child support enforcement agency (or a State or local government official authorized by the head of such an agency), if the person making the request certifies to the consumer reporting agency that

(A) the consumer report is needed for the purpose of establishing an individual's capacity to make child support payments or determining the appropriate level of such payments;

(B) the paternity of the consumer for the child to which the obligation relates has been established or acknowledged by the consumer in accordance with State laws under which the obligation arises (if required by those laws);

(C) the person has provided at least 10 days' prior notice to the consumer whose report is requested, by certified or registered mail to the last known address of the consumer, that the report will be requested; and

(D) the consumer report will be kept confidential, will be used solely for a purpose described in subparagraph (A), and will not be used in connection with any other civil, administrative, or criminal proceeding, or for any other purpose.

(5) To an agency administering a State plan under section 454 of the Social Security Act (42 U.S.C. § 654) for use to set an initial or modified child support award.

Appendix

15 U.S.C. § 1681e

§ 1681e. Compliance procedures

(a) Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section 605 and to limit the furnishing of consumer reports to the purposes listed under section 604. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604.

(b) Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

Appendix

15 U.S.C. § 1681g

§ 1681g. Disclosures to consumers

(a) Every consumer reporting agency shall, upon request and proper identification of any consumer, clearly and accurately disclose to the consumer:

(1) The nature and substance of all information (except medical information) in its files on the consumer at the time of the request.

(2) The sources of the information except that the sources of information acquired solely for use in preparing an investigative consumer report and actually used for no other purpose need not be disclosed *Provided*: That in the event an action is brought under this title, such sources shall be available to the plaintiff under appropriate discovery procedures in the court in which the action is brought.

(3) The recipients of any consumer report on the consumer which it has furnished —

(A) for employment purposes within the two-year period preceding the request, and

(B) for any other purpose within the six-month period preceding the request.

Appendix

(4) The dates, original payees, and amounts of any checks upon which is based any adverse characterizations of the consumer, included in the file at the time of the disclosure.

(b) The requirements of subsection (a) respecting the disclosure of sources of information and the recipients of consumer reports do not apply to information received or consumer reports furnished prior to the effective date of this title except to the extent that the matter involved is contained in the files of the consumer reporting agency on that date.

Appendix

15 U.S.C. § 1681m

§ 1681m. Requirements on users of consumer reports

(a) Whenever credit or insurance for personal, family, or household purposes, or employment involving a consumer is denied or the charge for such credit or insurance is increased either wholly or partly because of information contained in a consumer report from a consumer reporting agency, the user of the consumer report shall so advise the consumer against whom such adverse action has been taken and supply the name and address of the consumer reporting agency making the report.

(b) Whenever credit for personal, family, or household purposes involving a consumer is denied or the charge for such credit is increased either wholly or partly because of information obtained from a person other than a consumer reporting agency bearing upon the consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, the user of such information shall, within a reasonable period of time, upon the consumer's written request for the reasons for such adverse action received within sixty days after learning of such adverse action, disclose the nature of the information to the consumer. The user of such information shall clearly and accurately disclose to the consumer his right to make such written request at the time such adverse action is communicated to the consumer.

(c) No person shall be held liable for any violation of this section if he shows by a preponderance of the evidence that at the time of the alleged violation he maintained reasonable procedures to assure compliance with the provisions of subsections (a) and (b).

Appendix

15 U.S.C. § 1681n

§ 1681n. Civil liability for willful noncompliance

Any consumer reporting agency or user of information which willfully fails to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of —

(1) any actual damages sustained by the consumer as a result of the failure;

(2) such amount of punitive damages as the court may allow, and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney fees as determined by the court.

Appendix

15 U.S.C. § 1681o

§ 1681o. Civil liability for negligent noncompliance

Any consumer reporting agency or user of information which is negligent in failing to comply with any requirement imposed under this title with respect to any consumer is liable to that consumer in an amount equal to the sum of —

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney fees as determined by the court.